(1) Supreme Court, U.S.
FILED
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DOCKET NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

DWAYNE D. FOREHAND, Petitioner

vs.

THE STATE OF GEORGIA, Respondent

On Petition for Writ of Certiorari
to the Court of Appeals of the State of Georgia

PETITION FOR WRIT OF CERTIORARI

DODD AND DENNIS, P.C.
Sam D. Dennis
Attorney for Petitioner
Georgia State Bar No. 218315
Post Office Box 1066
Valdosta, GA 31603-1066
(912) 242-4470

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QUESTION PRESENTED

Does a curfew enacted by a Chief of Police which allows exceptions for chicken factory workers but not for the free exercise of religion impermissibly violate the First Amendment of the United States Constitution?

PARTIES TO PROCEEDING

There are no parties other than those listed in the caption.

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CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS ENTERED IN THIS CASE

State v. Forehand, 246 Ga. App. 590, 542 S.E.2d 110 (2000), cert. denied 2001 Ga. LEXIS 358 (April 30, 2001)

State v. Forehand, Dooly County Superior Court, Indictment No. 99DR-2241, Order of February 18, 2000, *nunc pro tunc* February 4, 2000.

STATEMENT OF JURISDICTION

1) The Court of Appeals of the State of Georgia entered it's Order in State v. Forehand, 246 Ga. App. 590, 542 S.E.2d 110 (2000), cert. denied 2001 Ga. LEXIS 358 (April 30, 2001) on October 13, 2000.
2) The Petitioner filed a Motion for Reconsideration which was denied by the Court of Appeals on November 1, 2000
3) The Supreme Court of the State of Georgia denied the Petitioner's Petition for Writ of Certiorari on April 30, 2001.
4) The Supreme Court of the State of Georgia denied Petitioner's Motion for Reconsideration on June 4, 2001.
5) The Supreme Court of the United States has authority to review the October 13, 2000 Order of the Court of Appeals of the State of Georgia pursuant to 28 U.S.C.A. 1257.

ORDINANCE AT ISSUE

The is no written ordinance. The Ordinance at issue is a curfew alleged to have been enacted by the Chief of Police David Musselwhite of the City of Vienna, Georgia. During the motions hearing at the trial court, Chief Musselwhite and Edward Bailey testified as to the provisions of the curfew, including but not limited to the fact that it made no exception for the free exercise of religion while making exception for chicken factory workers. Relevant portions of the transcript from the motions hearing are included in the appendix.

STATEMENT OF THE CASE

The Petitioner was arrested on April 18, 1999 while lawfully driving in his hometown of Vienna, Georgia. The arrest and indictments in this case resulted from a traffic stop made by Jones County Deputy Ed Bailey for violating an alleged unwritten curfew which was purportedly enacted subsequent to a tornado in Dooly County over four days earlier that April, 1999. At the time of the stop, the Petitioner was returning home after picking up his minor daughter and one of her friends from a church function. The Petitioner was stopped by Deputy Bailey because the deputy did not believe that the Petitioner was a chicken factory worker. (T 125) The Petitioner was stopped for no other reason than the alleged curfew violation and (T 125) was never cited or charged for a curfew violation.

The Petitioner filed numerous pre-trial motions including but not limited to a Motion to Quash based on the

violation of the free exercise of religion as guaranteed by the First Amendment of the United States Constitution. (R 49-51) On February 4, 2000, the trial court held a motion hearing in this case and the conclusion of that hearing, the trial court:

A) Finding as a matter of fact that there appeared to be no curfew on the night the Defendant was stopped;

B) Found that if there was a curfew, it was unconstitutional because it made exceptions for chicken factory workers; and

C) Found as a matter of law that there was no probable cause for the stop, and dismissed the case against the Defendant.

(T 136-138) (R 64-66)

The State appealed the trial court order, enumerating as an error that the trial court erred in granting Defendant's

Motion to Suppress the Stop and subsequently dismissing the case.

The Court of Appeals reversed the trial court and remanded the case back for trial, finding, among other things, that there was a valid, constitutional curfew which was not selectively enforced. State v. Forehand, 246 Ga. App. 590, 542 SE2d 110 (2000).

The Petitioner filed a Motion for Reconsideration in the Court of Appeals, arguing that the curfew, even if it existed and was properly enacted, was unconstitutionally overbroad as it prohibits the free exercise of religion. The Motion for Reconsideration was denied by the Court of Appeals on November 1, 2000.

The Petitioner filed a Petition for Writ of Certiorari in the Supreme Court of the State of Georgia, presenting as a question:

"1. Under general police powers, does a municipal

chief of police have the authority during an alleged emergency to create a law such as a curfew and allow exceptions for chicken workers but not for the free exercise of religion?"

The Supreme Court of the State of Georgia denied certiorari on April 30, 2001 and likewise denied the Motion for Reconsideration filed by Petitioner on June 4, 2001.

ARGUMENT IN SUPPORT OF GRANTING REVIEW

The Court of Appeals based its finding that a curfew existed solely on the testimony of Chief of Police Musselwhite. The evidence presented at the hearing was uncontroverted that, at the direction of Chief Musselwhite, Deputy Bailey was to enforce the alleged curfew but to allow chicken factory workers to proceed to work. (T 125) The evidence presented at the hearing was uncontroverted that Chief Musselwhite did not propose or allow or accommodate, in any way, exceptions to his alleged curfew for the free exercise of religion. (T 77-78; 88-89)

While Smith v. Avino, 91 F.3d 105 (11th Cir. 1996), does allow the enactment of temporary curfews in emergency situations as an exercise of police power, it also clearly states that even a properly enacted curfew which provides explicit standards may be unconstitutionally overbroad if it impermissibly prohibits constitutionally protected conduct,

like the free exercise of religion. Id at 108 (citing Grayned v. City of Rockford, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed. 2d 222 (1972)). The constitutionality of a curfew enacted in a time of emergency is limited to those restrictions imposed which were *necessary to maintain order*. Id. at 109 (citing United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971); Moorehead v. Farrelly, 727 F. Supp. 193 (D.V.I. 1989)) (emphasis added).

In the instant case, the Court of Appeals ignored the issue of religious freedom and found that there was no selective enforcement of this alleged curfew, despite uncontroverted testimony that the alleged curfew allowed exceptions for people traveling to work at a chicken processing plant but NOT for the free exercise of religion. State v. Forehand, 542 SE2d at 113. It is this failure to grant exceptions for the free exercise of religion, while allowing them for non-emergency workers, which renders this alleged

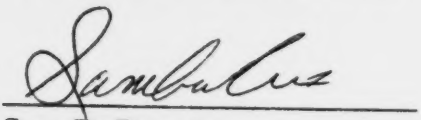
curfew, regardless of how it was enacted, constitutionally invalid. It was not necessary to restrict the free exercise of religion in order to maintain order if it was not necessary to restrict the travel of chicken factory workers to their place of employment.

The fact that the Court of Appeals attempted to side-step this issue by not referring to it does not make the issue, or the corresponding constitutional right to the free exercise of religion, non- existent, particularly in this case when this issue is so clearly supported by the record and this right to the free exercise of religion is so clearly supported by both the United States Constitution.

WHEREFORE, the Petitioner respectfully requests that this court grant a Writ of Certiorari to review the October 13, 2000 Order of the Court of Appeals of the State of Georgia in State v. Forehand246 Ga. App. 590, 542 SE2d 110 (2000)

Respectfully submitted this 4th day September, 2001.

DODD AND DENNIS, P.C.



Sam D. Dennis
Attorney for Petitioner
Georgia State Bar No. 218315

Post Office Box 1066
Valdosta, GA 31603-1066
(912) 242-4470

APPENDIX

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FIRST DIVISION

JOHNSON, C.J.,

SMITH, P.J., PHIPPS, J.

October 13, 2000

In the Court of Appeals of Georgia

A00A1597. STATE v. FOREHAND.

PHIPPS, Judge.

After an altercation with a deputy sheriff, Dwayne Forehand was indicted for felony and misdemeanor obstruction of law enforcement officer and simple battery. The court granted Forehand's motion to suppress a videotape which captured part of the altercation. And, after granting Forehand's motion to suppress the traffic stop which initiated the encounter, the trial court dismissed the indictment. The State appeals the grant of both motions and the dismissal of the indictment. We reverse the suppression of the videotape because we find that the stop was not invalid and that the probative value of the videotape is not

substantially outweighed by a danger of unfair prejudice to Forehand. We reverse the suppression of the stop and the dismissal of the indictment because we find that the stop was not invalidated by lack of formal enactment of a curfew or by selective enforcement of the curfew.

On April 15, 1999, a tornado struck the town of Vienna, in Dooly County, causing extensive damage. David Musselwhite, the Chief of Police, testified at a suppression hearing that in the days following the tornado the Vienna City Council enacted a resolution which gave the local police the authority to take action to protect the public safety. According to Musselwhite, the City Council placed him in charge of directing emergency affairs for the town, and adopted a resolution with his suggestion of a curfew from 7:00 p.m. to 7:00 a.m. for Vienna. To Musselwhite's knowledge, the curfew was not reduced to writing.

Musslewhite requested additional emergency relief personnel from law enforcement agencies of other jurisdictions. Jones County Deputy Sheriff Ed Bailey was

among those who went to assist in Vienna. Musselwhite informed Bailey of the curfew and told him to enforce it.

On April 18, Forehand was driving in Vienna at approximately 10:00 p.m. Bailey stopped him with the intention of telling him that he could not be on the streets at that time because of the curfew. According to Bailey, the following occurred. Forehand quickly exited his vehicle and approached Bailey in an aggressive manner. Irately, he asked Bailey, "Who are you?" and "Do you know who I am? You had no right to stop me." Then he yelled that he was the probate judge of Dooley County. Bailey put his hands up, and Forehand knocked them away. Bailey told Forehand that he was under arrest for "striking" and attempted to grab Forehand's arm to handcuff him. Forehand repeatedly pushed him away, and a physical altercation ensued during which Bailey and Forehand pushed, shoved and scuffled with each other and Forehand swung and hit Bailey in the back of his head.

A backup officer arrived at the scene just before the physical altercation between Bailey and Forehand. A video camera on that officer's car captured a portion of the events.

The trial court suppressed the videotape and commented that it did not capture the entirety of the events between Bailey and Forehand. The court explained that "to admit it to a jury would be terribly, terribly misleading because it lacks completeness." The court suppressed the stop, finding that no law has been enacted declaring a curfew and that no valid basis existed for the stop of Forehand. The court emphasized that there was no written evidence of the curfew and that exceptions from it apparently had been made for persons who needed to travel to and from work at a chicken factory outside the city limits.

1. "'While the trial court's findings as a to disputed facts in a ruling on a motion to suppress will be reviewed to determine whether the ruling was clearly erroneous, where the evidence is uncontroverted and no question regarding the credibility of witnesses is presented,

the trial court's application of the law to undisputed facts is subject to de novo appellate review.' [Cit.]"[1]

The State has inherent police power which "'extends to the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals.'"[2] That power "'is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of public interest.' [Cit.]"[3] The enactment of temporary curfews in emergency situations has been upheld as a legitimate use of police power although such measures curtail the movement of persons who otherwise would enjoy freedom from restriction.[4] Here, there appears to be no dispute that a state of emergency existed in the City of Vienna and that directions to enforce a curfew formed the

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[1] State v. Stearns, 240 Ga. App. 806, 807 (524 SE2d 554) (1999) (citations omitted).

[2] Veit v. State, 182 Ga. App. 753, 756 (2) (357 SE2d 113) (1987).

[3] Id.

[4] See Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) and cases cited therein.

basis for Bailey's stop of Forehand. In a state of emergency, the State may exercise its inherent police powers to enforce a temporary curfew even if no curfew ordinance has been formally enacted.

We view this case as factually distinguishable from cases which have held that where an ordinance is relied on, such as in the case of a stop for a violation of local law, the ordinance must be pleaded and proved in the trial court, and absent a properly admitted copy of the ordinance, neither the trial court nor this court may take judicial notice of its existence.[5] The police power to take emergency actions in the public interest is inherent and does not derive from statute. Thus, it cannot be said that a legitimate exercise of police power necessarily depends upon the existence of a formal enactment.

We find that even without a formal enactment of a curfew ordinance Bailey was acting legitimately when he

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[5] See, e.g., In the Interest of J.T., 239 Ga. App. 756, 757-58 (521 SE2d 862) (1999) and cases cited therein.

stopped Forehand. The issue is whether his motives and actions at the time and under all the circumstances were reasonable and not arbitrary or harassing. [6]

The generally articulated standard of reasonableness for a traffic stop is whether the law enforcement officer witnessed an "objective manifestation that the person stopped [was], or [was] about to be, engaged in criminal activity."[7] In this instance, the concern is whether there was an objective manifestation that Forehand was violating or was about to violate the emergency curfew designed to protect the public interest.

Clearly, there was such a manifestation. According to the Vienna police chief, the 7:00 p.m. to 7:00 a.m. curfew had been in effect for several days and had been highly publicized in the area. Bailey saw Forehand driving on the streets of Vienna at night several hours after the nightly

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[6] See State v. Armstrong, 223 Ga. App. 350, 352 (2) (477 SE2d 635) (1999).

[7] Id. at 351 (citations and punctuation omitted.)

curfew began. There is no evidence that Bailey's actions in stopping Forehand were arbitrary or harassing. He had been authorized and instructed by the police chief to enforce the curfew. Contrary to the trial court's determination, we find that Bailey acted legitimately when he stopped Forehand.

We find no evidence that the curfew was selectively enforced, which would have rendered the stop constitutionally invalid.[8] The record discloses that Bailey initially was told that no one was allowed to be out during the curfew, that the police patrol was concentrated in residential areas, and that Bailey was instructed later to allow persons to travel to and from work at a chicken plant outside of town. The record does not disclose that others required to work in the wake of the storm were not allowed to travel for that purpose.

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[8] See State v. Manos, 237 Ga. App. 699, 700 (516 SE2d 548) (1999).

For these reasons, we find that the trial court erred in suppressing evidence of the stop and concomitantly dismissing the indictment.

2. The state contends that the trial court incorrectly suppressed the videotape on the ground that it did not capture the entire encounter between Bailey and Forehand. Forehand has filed a motion to dismiss the State's appeal of this issue. He contends that the State is statutorily precluded from appealing this issue and that, therefore, this court is without jurisdiction to consider it.

Forehand correctly argues that the authority of the state to appeal an adverse ruling in a criminal case is limited to the six (formerly five) instances enumerated in OCGA § 5-7-1,[9] and that while the State may appeal "[f]rom an order, decision, or judgement suppressing or excluding evidence illegally seized . . . ,"[10] it may not appeal the exclusion of

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[9] See Ritter v. State, 269 Ga. 884,885-886 (2) (506 SE2d 857) (1998).

[10] OCGA § 5-7-1 (a) (4) (emphasis added).

evidence which is based only upon some general rule of evidence.[11]

However in State v. Pastorini,[12] this court held that the State may appeal an order which suppresses evidence based upon both general rules of evidence and a determination that the evidence was illegally obtained. We find Pastorini to be controlling here. Forehand moved to suppress the videotape on the grounds that the stop was unlawful, pretextual, and lacking in reasonable, articulable suspicion and probable cause, and that the videotape did not reflect an accurate and total depiction of the incident. The order granting the motion to suppress the videotape did not state a basis for granting it. But the order did specifically state that "there [were] no grounds for a stop, and that there was no probable cause to initiate a traffic stop of [Forehand]." Although the court commented at the

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[11] Berky v. State, 266 Ga. 28, 29 (463 SE2d 891) (1995); State v. Lavell, 214 Ga. App. 525 (448 SE2d 270) (1994).

[12] 226 Ga. App. 260 (48o SE2d 399) (1997).

conclusion of the suppression hearing that it was suppressing the videotape because it did not completely depict the encounter and would be misleading to a jury, because the court also suppressed the stop, it is apparent that the videotape also would have been suppressed as fruit of the poisonous tree. Thus, we find that the State was authorized to appeal the suppression of the videotape pursuant to OCGA 5-7-1 (a) (4), and we deny Forehand's motion to dismiss this portion of the appeal.

In division 1, we found that Bailey was authorized to stop Forehand. Accordingly, the videotape could not be suppressed on the basis of an invalid stop. Next, we consider whether the videotape was properly suppressed on the ground that it did not depict the entire incident and would be misleading to a jury.

"The rule in Georgia is well-established that 'relevant evidence may be excluded if its probative value is substantially outweighed be the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

consideration of undue delay, waste of time, or needless presentation of cumulative evidence. . . . [S]uch considerations are appropriately committed to the trial court's sound exercise of discretion.' [Cit.]"[13] However, "[t]he Georgia rule favors the admission of any relevant evidence, no matter how slight its probative value."[14]

The trail court did not address the issue of whether the probative value of the videotape was substantially outweighed by a danger of unfair prejudice to Forehand. We find that the videotape has substantial probative value towards establishing the facts and nature of the physical altercation between Forehand and Bailey. On the other hand, we do not find that there is a substantial danger that Forehand would be unfairly prejudiced if the videotape is shown to a jury. There was no contention that the videotape

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[13] DeCastro v. State, 221 Ga. App. 83, 84 (470 SE2d 748) (1996) (citations and punctuation omitted).

[14] Martin v. State, 235 Ga. App. 844, 845 (3) (510 SE2d 602) (1998) (citations and punctuation omitted).

shown to the trail court is not a videotape of the altercation.[15] There is a contention that it does not totally and completely depict the altercation. To the extent the videotape does not capture the entire course of events between Forehand and Bailey and does not capture the audio portion of the encounter, other forms of evidence such as oral testimony may be presented.[16] Moreover the jury is authorized to consider any incompleteness of the videotape in determining the amount of weight and credibility to accord it.[17] For the

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[15] Forehand asserts that the copy of the videotape submitted to this court is a poor copy of the videotape shown in the trial court and does not present the beginnings of the physical altercation as clearly as that tape. The parties are not confined to showing the copy of the tape that was submitted to this court is there is a clearer copy available.

[16] See Harmon v. State, 224 Ga. App. 890, 894 (4) (482 SE2d 730) (1997) (videotape properly admitted despite lack of sound and zooming problems where there was no contention that it inaccurately portrayed subject events).

[17] See Anderson v. State, 237 Ga. App. 595, 596-597 (3) (516 SE2d 315) (1999) ("'The weight and credibility of witnesses are questions for the triers of fact; that some evidence offered by a witness seems contradictory to his own or to some other's, or incomplete or uncertain, does not automatically discredit the evidence given by that witness, or others, for it is thee function of the triers of fact to determine to what evidence it gives credence. . . .'[Cit.]" (Emphasis added)).

reasons and those presented in division 1, we find that the videotape should not have been suppressed.

Judgment reversed. Johnson, C. J., and Smith, P.J. concur.

IN THE SUPERIOR COURT OF DOOLY COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	: CHARGE:
	: Obstruction of
	: an Officer (2 counts)
	: Simple Battery
vs.	:
	: INDICTMENT NO.
	: 99DR-2241
DWAYNE DONALD FOREHAND,	:
Defendant.	:

ORDER

The prosecution's Motion for Similar Transactions and the Defendant's Motion for Disclosure of Impeaching Information, Motion to Preserve Evidence, Motion to Produce and Motion for Exculpatory Evidence, Demand for Defendant's Statements, Demand for List of Witnesses, Motion to Suppress Statements, Motion to Suppress Video Tape, Motion to Produce Certified Copy of Curfew (argued by agreement of counsel as a Motion to Suppress Stop) and Motion Reserving the Right to File Additional Motions, Motion to Produce Certified Copy of Document Declaring State of Emergency in Dooly county, Georgia on April 18,

1999 and Motion Reserving the Right to File Additional Motions, Motion to Produce Copy of Documents Giving Ed Bailey Authority to Act as Law Enforcement Officer in Dooly County and Motion Reserving Right to File Additional Motions, Motion to Produce list of Members of Local Emergency Management Organization Created Pursuant to O.C.G.A. 38-38-27 and any Emergency Management Plains Established by that Organizationfor Dooly County and/or Vienna, Georgia and Motion Reserving the Right to File Additional Motions, Motion for Clarification of the Status of Ed Bailey and Motion Reserving the Right to File Additional Motions, Motion to Quash the Indictment as Violating the Defendant's Free Exercise of Religion and Right to Assembly, and Motion to Quash the Indictment, having come on for regularly scheduled hearing on February 4, 2000, at 11:00 am in the Baldwin County Courthouse, before the Honorable James L. Cline, Jr., and evidence and argument having been heard and considered by the Court,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1)

Whereas the State failed to prove sufficient similarity between the alleged similar transactions and the case in chief, and whereas the State failed to meet its burden pursuant to Williams v. State, 261 Ga. 640 (1991), THE STATE'S MOTION FOR SIMILAR TRANSACTION IS HEREBY OVERRULED AND DENIED;

(2)

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS IS OVERRRULED AND DENIED.

(3)

THE DEFENDANT'S MOTION TO SUPPRESS VIDEOTAPE IS GRANTED;

(4)

THE DEFENDANT'S MOTION, PRESENTED AND ARGUED BY AGREEMENT OF COUNSEL, TO SUPPRESS THE STOP IS HEREBY GRANTED;

(5)

Whereas the State has not and cannot produce a copy of any curfew that is alleged to have been in effect on the night the defendant was stopped, and it appears there is no such curfew and for other reasons, including Constitutional reasons, the Court finds there are no grounds for a stop, and there was no probable cause to initiate a traffic stop of the defendant; and therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the case is hereby dismissed, and no further action shall be taken against this defendant for the acts alleged in this indictment.

SO ORDERED this 18th day of February, 2000, nunc pro tunc 4th day of February 2000.

_____

HONORABLE JAMES L. CLINE, JR.
SUPERIOR COURT JUDGE

Court of Appeals
Of the State of Georgia

ATLANTA,

NOVEMBER 01, 2000

The Court of Appeals hereby passes the following order:

Case No. A00A1597
THE STATE v. DWAYNE D. FOREHAND

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it hereby be denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: April 30, 2001

Case No. S01C0364

DWAYNE D. FOREHAND v. THE STATE

COURT OF APPEALS CASE NO. A00A1597

The Supreme Court today denied the petition for certiorari in this case.

All the justices concur.

Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

Case No. S01C0364

Atlanta, June 04, 2001

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DWAYNE D. FOREHAND v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur.

Sherie M. Welch, Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF
DOOLY
STATE OF GEORGIA

THE STATE	)	
	)	
v.	)	CASE NO. 99-DR-2241
	)	
DWAYNE DONALD FOREHAND	)	
	)	

MOTIONS
HEARD BEFORE HONORABLE JAMES L. CLINE, JR.
JUDGE, SUPERIOR COURTS
OCMULGEE JUDICIAL CIRCUIT
BALDWIN COUNTY COURTHOUSE
MILLEDGEVILLE, GEORGIA
FEBRUARY 4, 2000

APPEARANCES OF COUNSEL:

For the State: KENNETH B. HODGES, III,
DISTRICT ATTORNEY

For the Defendant: SALEEM DAVID DENNIS,
ATTORNEY AT LAW

****

DENNI K. MACK, CVR, CCR, B-489
OFFICIAL COURT REPORTER
OCMULGEE JUDICIAL COURT
Monticello, Georgia 31064
(706) 468-2549

MOTIONS TO SUPPRESS

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CHIEF DAVID MUSSELWHITE

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MOTION TO QUASH THE INDICTMENT

THE COURT: Right. And Motion to Quash the Indictment as violating the defendant's free exercise of religion. And then, fourteen, a general motion to quash.

MR DENNIS: Your Honor, briefly as to number thirteen, I can certainly provide evidence through Mrs. Forehand, Judge Forehand had taken someone home after a church function, one of his daughter's friends. His daughter and two of her friends were dropped off There at his house on a church bus. And they went to take one of her friends home out in the country, fairly out in the country there, and were coming back and that's when the stop occurred. The reason that that motion is made is simply – and it's another reason we have to have a copy of the curfew, Judge. It's – if you're going to pass laws, you have to make exceptions for church functions and there will be evidence that Chief Musselwhite said that these church people ought to stay At home, you know, past whatever

hour it was he determined the curfew was going to be and that will be evidenced at trial for that. But the reason –

THE COURT: Well, you don't have a curfew.

MR. DENNIS: And my hands, therefore, are tied, Judge, because, obviously, there's no exception making it allowable for people to exercise their right to assembly and their right to religion. If there's no curfew there and you just stop anybody at random, that doesn't make – that's not constitutional. That's the problem and …

THE COURT: Well, I understand your contentions.

MR. DENNIS: And I guess my hands are tied, Judge. If I don't have a curfew, I don't know how we can test its validity.

MR. HODGES: Your Honor, if I understand Mr. Dennis' argument, then any armed robber on the way back form a armed robbery that stops off at a church can't be stopped by law enforcement.

MR. DENNIS: That's not true, Judge.

THE COURT: I said I understood his contentions, Mr. Hodges. I didn't say I agreed with them.

MR. DENNIS: Well, Judge, just to distinguish that, there's a statute against armed robbery. There is no statute against curfews. There's no legislative enactment that says you can't be out on the streets of Vienna at any particular specified time, which makes exception for church. I mean this was a time when everybody's homes or a lot of people's homes were destroyed by tornadoes. My gosh, this is when people were going to church. They needed God. And this is when we turn to the Lord, a lot of Christians do, is in times of need like this. And, certainly, a curfew like that should make exceptions to church and/or emergency work. You know, people doing construction late at night. That sort of thing. But we can't test that because we don't have one.

THE COURT: Well, all right. Let's see if we can't consolidate evidentiary presentation on several of these and here some testimony from Officer Bailey and from Chief Musselwhite and from whoever else we may have here and see if we can't piece all of this together.

PAGE 77, LINE 14 THROUGH PAGE 78, LINE 2

DIRECT EXAMINATION OF CHIEF DAVID MUSSELWHITE BY MR. HODGES

Q Now did you – were there any exceptions to the curfew?

A We did have some people violating the curfew and, if they didn't know about it, they were stopped by officers and asked what their business was and asked to please get off the streets.

Q Well, what I mean by my question was, were there any – could anyone be out during the curfew for any reason whatsoever?

A Only emergency personnel.

Q Could anyone violate the curfew or be excused from the curfew to go to church?

A Not to my knowledge. No, we didn't make those exceptions.

PAGE 81, LINES 4 THROUGH 22

CROSS EXAMINATION OF *CHIEF DAVID* MUSSELWHITE BY MR. DENNIS

Q The bottom line is, no one wrote down what time the curfew would be, did they?

A We did announce it through the media and, also, we went around—

THE COURT: Chief, if you will, answer the question and then you can explain it, if you'd like to.

WITNESS: Okay. Question again, please.

BY MR. DENNIS:

Q The question is no one – and I'll rephrase it. No one with the City Council or yourself wrote down what the curfew would be, what times it would be?

A Not that I know of.

Q Okay. No one recorded it in the City Clerk's Office?

A Not that I'm familiar with.

Q No one recorded it in the minutes of the meeting?

A Not that I'm familiar with.

PAGE 88, LINE 3 THROUGH PAGE 89, LINE 5

CROSS EXAMINATION OF CHIEF DAVID MUSSELWHITE

BY MR. DENNIS

Q There were no exceptions in the curfew, as far as you know, made for people going to and from church?

A As far as I know, no exceptions made. If somebody was—

Q You said going to church – I don't mean to Interrupt you, but – it's past 7:00 P.M. on Sunday night in Vienna. Going to church violates that curfew? If they was out on the streets, had to walk from your home to the First Baptist Church, that violates the curfew?

A He was coming – if you're on the streets, you in violation of the curfew that night.

Q If you were just going to church?

A Right.

Q Or coming back from church?

A Right.

Q Ain't no way to get to and from church without being on the streets. Right?

A As far as I know.

Q So there's no way to get to church in the city of Vienna past 7:00 P.M. without violating that curfew?

A I think the churches in Vienna were aware of that situation and they made arrangements for people to be through with church and off the streets, is my understanding.

Q Okay. My question to you, sir, if you want to go to church past 7:00 P.M., there's no way to do it without violating that curfew in the City of Vienna, unless you lived inside a church building? Right?

A That would be right.

PAGE 104, LINE 22 THROUGH PAGE 105, LINE 8

DIRECT EXAMINATION OF EDWARD BAILEY BY MR. HODGES

Q Okay. And to your knowledge, was there a curfew in effect?

A Yes, there was.

Q And who advised you of this?

A The Chief. Chief Musselwhite of Vienna P.D.

Q And what did he advise – wh was your understanding of the curfew?

A That anybody out during the designated hours, I believe it was from seven to seven or from six to six, to be stopped and told to go home. That nobody could be out. If I had any problems, contact him and he would handle it from there.

PAGE 124, LINE 2 THROUGH PAGE 125, LINE 23

CROSS EXAMINATION OF ED BAILEY BY MR. DENNIS

Q And that's my question - - is, you made the decision, if he was going to go on out of town, you weren't going to pull him over?

A That's correct.

Q And that's what existed in your mind. Right?

A Yes, sir.

Q That decision process was going on in your head. You had not asked anybody else whether to pull Judge Forehand over? Right?

A Right?

Q You made that decision by yourself?

A Right?

Q Without anybody else telling you what to do?

A Correct.

Q Now, technically, the way you understood it, he was in violation of the curfew when you first say him there in the city limits?

A Uh-huh. (affirmative).

Q And you could have pulled him over right then?

A Immediately.

Q Immediately you could have stopped him.

A. Yes.

Q But you, in your own mind, made a decision to - - to pull him over only if he turned down a side street?

A Based on what Chief Musselwhite had explained to me. He – if I'm not mistaken, he said everybody in the city is in Violation of the curfew. But then they had – that particular night, they said some people who worked at some chicken factory might be going back and forth to work. So, if they – they do, you can stop them, but they have a right to go to work that particular night. So let them move on. And if he was already moving out of town –

Q It was your understanding that, as long as people had a right to be there, you didn't want to stop them? Right?

A I mean as far as – I don't understand what you mean there either. I apologize.

Q In your mind, there was an exception made for people that worked at the chicken factory?

A That is correct.

Q All right. There was no other reason for the stop?

A Other than violation of curfew?

Q Right.

A There was absolutely none.

PAGES 136, LINE 23 TRHOUGH 138, LINE 13

OPINION OF THE COURT

THE COURT: Counsel, there is in existence no law regarding this curfew. The City Council, in my opinion, did not create any curfew. They did not create any law. This is tantamount to the Georgia General Assembly meeting today and they decide that they want – say, well, we'll have- – let's have a curfew. There's a lot of crime out on the street. Let's have a curfew. And everybody votes for a curfew and they pick up the phone and call the Governor and they say, Governor Barnes, we decided we need a curfew. And the Governor says, jam up. Curfew would be good. And so they call the Chief of the Georgia State Patrol – Colonel – and say, Colonel, we all decided – the Senators and Representatives and the Governor, we've decided we need a curfew. Y'all do whatever you need to do to enforce the curfew. Not a single thing's been signed.

Not a single thing done. There's not a single law that's in force. And that's what we've got here. And we've got a non-existing law upon which this entire thing was predicated. It's not a law that's in existence that an officer – that might subsequently be declared unconstitutional for some reason or another, that an officer could act upon the law. And this is an action taken on a law or alleged law that does not even exist. Not in the least. It's not in writing; it's not on the minutes; it's not anywhere, except it's just in somebody's mind. And were out here stopping the public or not stopping the public, depending on whether they work at the chicken factory or not. That's selective enforcement in and of itself. It violates the equal protection clause of the Constitution of the State of Georgia and the United States of America, that, in and of itself.

This case – you know – I assume this is part and parcel of some motion that you've got in here.

At any rate, whatever it falls appropriately under, I dismiss this matter. There's no merit here. There's no law to be enforced.

Send me an order.

MR. DENNIS: Thank you, Judge, I will.

(Whereupon the above entitled matter was concluded.)

IN THE SUPERIOR COURT OF DOOLY COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:CHARGE:Obstruction of : an Officer : (2 Counts) : Simple Battery :
vs.	: :INDICTMENT NO. : 99DR-2241
DWAYNE DONALD FOREHAND, Defendant.	: : :

MOTION TO QUASH THE INDICTMENT AS VIOLATING DEFENDANT'S FREE EXERCISE OF RELIGION AND RIGHT TO ASSEMBLY

COMES NOW the Defendant in the above styled case, and files this, his Motion to Quash the Indictment as violating Defendant's Free Exercise of Religion and Right to Assembly shows the Court the following.

1.

The Defendant is charged with simple battery and obstruction of an officer resulting from a traffic stop for violating an alleged curfew.

2.

There is no code section cited on his booking form, nor has he been prosecuted for violating any alleged curfew.

3.

There was no reason given for the traffic stop of the defendant on April 18, 1999.

4.

When questioned by Ed Bailey at the beginning of the stop, the defendant told Bailey that he was returning home with his daughter and her friend after a church function.

5.

Any curfew which impinges a person's right to assembly is unconstitutional and the attempted enforcement of such violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section I, Paragraph IX of the Georgia Constitution.(Const. U.S., Amend. I, XIV; Const. Ga., Art. I, Sec. I, Par. IX.)

6.

Any curfew which impinges in a person's free exercise of religion is unconstitutional and the attempted

enforcement of such violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section I, Paragraph IV of the Georgia Constitution.(Const. U.S., Amend. I, XIV; Const. Ga., Art. I, Sec. I, Par. IV.)

7.

When the Defendant told Ed Bailey that he was returning from church, all potential or possible probable cause for the stop ended and the Defendant should have immediately been free to return home.

8.

The indictment results from the attempted enforcement of the alleged curfew in violation of the U.S. and Georgia Constitution and denies this defendant his constitutional rights, including but not limited to the free exercise of religion and right to assembly.

WHEREFORE, the Defendant prays that he be discharged from said accusation.

This 22d day of November, 1999.

DODD AND DENNIS, P.C.

_____

Roger J. Dodd
Attorney for Defendant
State Bar Number 244300

_____

Sam D. Dennis
Attorney for Defendant
State Bar No. 218315

P.O. Box 1066
Valdosta, GA 31603
(912) 242-4470

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

THE STATE, Appellant	:	
	:	Case No: A00A1597
vs.	:	
DWAYNE D. FOREHAND Appellee	:	

MOTION FOR RECONSIDERATION

Comes now, Dwayne D. Forehand, and files this Motion for Reconsideration of the Court's Order of October 13, 2000 and in support states as follows:

Motion to Dismiss State's Appeal

1.

The Court, in its October 13, 2000 Opinion, correctly stated that the State cannot appeal an order to suppress a videotape which was granted on general evidentiary grounds.

2.

In State v. Pastorini, 226 Ga. App. 260 (1997), on which this Court relies in its October 13, 2000 Opinion in this matter, the trial court order in that case *expressly*

concluded that the evidence had to be suppressed because of illegal seizure *as well as* general evidentiary grounds. Id. Emphasis added.

3.

The Court of Appeals is bound to construe OCGA § 5-7-1 strictly against the State. See Glenn v. State, 271 Ga. 604 (1999) and Berky v. State, 226 Ga. 28 (1995).

4.

The Court erred in its October 13, 2000 Opinion when it denied the Appellee's motion to dismiss the state's appeal of the suppression of the videotape.

5.

The trial court suppressed the videotape based soley on general evidentiary grounds. The trial court was quite clear in making this ruling and there is nothing in the record or the trial court order to support this Court's assertion that the suppression was also granted because the tape was illegally seized. (T 136)

6.

This Court overlooked the fact that the trial court went on to then DENY Appellee's Motion to Suppress Statements. (T 136). Had the trial court "intended" to suppress the videotape as "fruit of the poisonous tree," as this Court suggests, it would additionally have not only "intended" to Suppress the Statements as the fruit of that same tree, it would have done so.

7.

The fact that the trial court did not suppress the statements makes it apparent that the trial court judge suppressed the videotape for the reasons clearly stated at the hearing. ("[T]o admit [the videotape] to a jury would be terribly, terribly misleading because it lacks completeness. . . . And *based on that,* I grant the motion to suppress the tape." T 136. Emphasis added.)

Constitutionality of Curfew

8.

The Court, in its October 13, 2000 Opinion, correctly stated that the Court has upheld the enactment of temporary curfews in emergency situations as an exercise of police power but overlooks the rest of the case it cited for this proposition, Avino v. Smith, 91 F.3d 105,109 (11th Cir. 1996), which clearly states that even a properly enacted curfew which provides explicit standards may be unconstitutionally overbroad if it prohibits constitutionally protected conduct, like the free exercise of religion. Id.

9.

It was uncontroverted at the motion hearing that any alleged curfew contained no provisions allowing for the free exercise of religion. In fact, exercising religion would violate the curfew while working at a chicken factory would not. (Cross Examination of Chief Musselwhite, T-77-78).

Standard of Review

10.

The Court, in its October 13, 2000 Opinion, correctly stated that a trial court's findings as to disputed facts and issues of witness credibility, in ruling on a motion to suppress, are subject to the "clearly erroneous" standard of review, but then proceeded to review this case *de novo*, failing to follow its own precedent in State v. Stearns, 240 Ga. App. 806, 807 (1999). See also Vansant v. State, 264 Ga. 319 (1994).

11.

Citing Mao v. State, 222 Ga. App. 482, 483 (1996), this Court recently held that "[i]n reviewing a trial court's order granting a motion to suppress, we construe the evidence most favorably to uphold the trial court's ruling . . . . It is the trial court's duty to resolve conflicts in the evidence, and its findings of facts and credibility will not be disturbed on appeal unless they are clearly erroneous." State v. Kwiatkowski, 238 Ga. App. 390 (1999).

12.

The three principals used by the court in reviewing a trial court's order concerning a motion to suppress, 1) that the judge is the trier of fact and his findings should not be disturbed if there is evidence to support it, 2) the trial court's decisions regarding questions of fact and credibility must be accepted unless clearly erroneous, and 3) the reviewing court *must* construe the evidence most favorably to upholding the trial court, apply equally to trial court rulings in favor of the defendant. Tate v. State, 264 Ga. 53, 54 (1994).

13.

The trial court made both findings of fact, based on its assessment of controverted evidence and witness credibility, as well as findings of law based on its findings of fact. (T 136-138)

14.

The trial court made a finding of fact regarding the alleged curfew, the finding that no curfew actually existed, contrary to the testimony of the State's witness, Chief Musselwhite. (T 136-137)

15.

The trial court made a finding of law, that even if a curfew existed, it was unconstitutional and unenforceable

because it violated the First Amendment of the United States Constitution. (T 137-138)

16.

Based on both the finding of fact, that no curfew existed, and the finding of law, that if a curfew did exist, it was unconstitutional, the trial court made a finding of law, that there was no probably cause for the stop. On the basis of this finding of law, he properly dismissed the charges against the Appellee. (T 136-138)

17.

The trial court made a finding of fact regarding the videotape, that the videotape was misleading, based on the videotape itself, as well as the testimony of Deputy Bailey regarding the tape. (T 107, 110, 115-121, 136)

18.

Based on the finding of fact, that the videotape was misleading, the trial court made a finding of law, that it would improperly and unconstitutionally prejudice the Appelle for the tape to be shown to the jury. (T 136)

19.

The two findings of law that are the subject in this appeal, that the videotape should be suppressed and that there was no probable cause for the stop, are both based on

the trial courts findings on controverted facts and assessment of witness credibility. (T 136-138)

20.

The State claimed that there was a curfew and put forward the testimony of Chief Musselwhite in support of its claim. The Appellee claimed that there was no curfew and challenged the testimony of Chief Musselwhite. (T 54-58, 74-78, 81, 109)

21.

The State claimed that the videotape was a fair and accurate representation of the conflict between the Appellee and Deputy Bailey and put forward not only the tape, but the testimony of Deputy Bailey in support of their contention. The Appellee claimed that the videotape was an incomplete and inaccurate representation of the conflict between the Appellee and Deputy Bailey. (T 107, 110, 115-121)

22.

The "clearly erroneous" standard of review should be applied in this case because the trial court clearly made determinations regarding controverted evidence and witness credibility. State v. Stearns, 240 Ga. App. 806, 807 (1999); See also Vansant v. State, 264 Ga. 319 (1994).

WHEREFORE, Appellee respectfully requests that this court reconsider its Order of October 13, 2000 and affirm the trial court's Order suppressing the videotape and stop and dismissing this case.

This _____day of October, 2000.

DODD AND DENNIS, P.C.

_____

Sam D. Dennis
Attorney for Appellant
State Bar No. 218315

Post Office Box 1066
Valdosta, GA 31603-1066
(912) 242-4470

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

DWAYNE D. FOREHAND,	:	
Petitioner	:	Court of Appeals
	:	Case No.: A00A1597
vs.	:	
	:	
THE STATE	:	
Respondent.	:	

PETITION FOR WRIT OF CERTIORARI

Comes now, Dwayne D. Forehand, and files this Petition to the Supreme Court of Georgia for Writ of Certiorari in this case and shows as grounds:

Jurisdiction

1.

This is a criminal case which was dismissed by the trial court on February 4, 2000.

2.

The State appealed the dismissal and the Court of Appeals of the State of Georgia reversed the trial court on October 13, 2000. Attached as Exhibit A.

3.

The Petitioner filed a Motion for Reconsideration which was denied by the Court of Appeals on November 1, 2000. Attached as Exhibit B.

4.

The Petitioner filed a Notice of Intent to File Petition for Writ of Certiorari with the Court of Appeals within ten (10) days of the Order denying reconsideration in this matter.

5.

The Petitioner has filed a Notice of Filing Petition for Writ of Certiorari with the Court of Appeals simultaneously with the filing of this Petition.

6.

The Supreme Court has jurisdiction under Art. 6, Sect. 6, Para. 5 of the Georgia Constitution to review the October 13, 2000 Order of the Court of Appeals in this case because of the issues of gravity and great public importance involved.

Procedural History

7.

Petitioner was arrested on April 18, 1999 and indicted on October 18, 1999 with two (2) counts of Obstruction of an Officer and one (1) count of Simple

Battery in the Superior Court of Dooly County Case No. 99DR-2241.

8.

Petitioner's arrest and indictment resulted from a traffic stop made by Jones County Deputy Ed Bailey for violated an alleged curfew which was purportedly enacted subsequent to an alleged tornado in Dooly County over four days earlier that April, 1999.

9.

On February 4, 2000, the trial court held a motion hearing in this case and the following was ordered by the trial court at the conclusion of that hearing:

A) The State's Motion for Similar Transaction was denied;

B) Defendant's Motion to Suppress Videotape was granted;

C) Defendant's Motion to Suppress Statements was denied;

D) Defendant's Motion to Suppress Stop was granted;

E) Finding as a matter of fact that there appeared to be no curfew on the night the Defendant was stopped, the trial court found as a matter of law that there was no probable cause for

the stop, and dismissed the case against the Defendant.

10.

The State appealed the trial court order, enumerating as errors:

1) That trial court erred in granting Defendant's Motion to Suppress the Videotape.

2) That the trial court erred in granting Defendant's Motion to Suppress the Stop and subsequently dismissing the case.

11.

The Petitioner objected to and moved that the Court of Appeals dismiss the State's appeal of the Motion to Suppress the videotape because the appeal does not fall within one of the statutorily enacted and authorized exceptions as defined in O.C.G.A. §5-7-1

12.

The Court of Appeals reversed the trial court and remanded the case back for trial, finding that:

A) There was a valid, constitutional curfew which was not selectively enforced;

B) The suppression of the videotape was appealable under State v. Pastorini, 226 Ga. App. 260 (1997); and

C) The videotape should not have been suppressed.

13.

Questions Proposed to this Court

I.

Under general police powers, does a municipal chief of police have the authority during an alleged emergency to create a law such as a curfew and allow exceptions for chicken workers but not for the free exercise of religion?

The Court of Appeals based its finding that a curfew existed solely on the testimony of Chief of Police Musselwhite. The evidence presented at the hearing was uncontroverted that, at the direction of Chief Musselwhite, Deputy Bailey was to enforce the alleged curfew but to allow chicken factory workers to proceed to work. The evidence presented at the hearing was uncontroverted that Chief Musselwhite did not propose or allow or accommodate in any way exceptions to his alleged curfew for the free exercise of religion.

While Avino v. Smith, 91 F.3d 105,109 (11th Cir. 1996), does allow the enactment of temporary curfews in emergency situations as an exercise of police power, it also clearly states that even a properly enacted curfew which provides explicit standards may be unconstitutionally

overbroad if it prohibits constitutionally protected conduct, like the free exercise of religion. Id.

The Court of Appeals further created a common law exception to the statutorily defined ways in which a curfew may be enacted in an emergency situation. There was no evidence presented that a Chief of Police has statutory authority to enact a curfew nor was there any evidence presented that a curfew was enacted by any of the means currently authorized by statute in the State of Georgia. O.C.G.A. § 38-3-1 through § 38-3-56.

II.

Under State v. Pastorini, 226 Ga. App. 260 (1997), can the Court of Appeals create a common law addition to O.C.G.A. § 5-7-1, allowing the State to appeal an order suppressing a videotape on general evidentiary grounds?

While the trial court, in its Order, did not specify the grounds on which the videotape was suppressed, the trial court was very clear in making its ruling at the hearing that the videotape was being suppressed on general evidentiary grounds, because it was misleading. The fact that the trial court went on to *deny* another of Defendant's Motions to Suppress subsequent to granting the Motion to Suppress the Videotape is further proof that the Court granted the Motion to Suppress the Videotape for the reason so clearly stated: because it was misleading.

The Court of Appeals is bound to construe OCGA § 5-7-1 strictly against the State. See Glenn v. State, 271 Ga. 604 (1999) and Berky v. State, 226 Ga. 28 (1995). In State v. Pastorini, the trial court order in that case *expressly* concluded that the evidence had to be suppressed because of illegal seizure *as well as* general evidentiary grounds. State v. Pastorini, 226 Ga. App. 260 (1997). Emphasis added.

WHEREFORE, the Petitioner respectfully requests that this court grant a Writ of Certiorari to review the October 13, 2000 Order of the Court of Appeals of the State of Georgia in State v. Forehand, Case No. A00A1597.

This 20th day of November, 2000.

DODD AND DENNIS, P.C.

Sam D. Dennis
Attorney for Appellant
State Bar No. 218315

Post Office Box 1066
Valdosta, GA 31603-1066
(912) 242-4470

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

DWAYNE D. FOREHAND,	:	
Petitioner	:	
	:	Case No.: S01C0364
vs.	:	
	:	
THE STATE	:	
Respondent.	:	

MOTION FOR RECONSIDERATION

Comes now, Dwayne D. Forehand, and files this Motion for Reconsideration of the Court's Order of April 30, 2001 denying Petitioner's Petition for a Writ of Certiorari and in support states as follows:

The State claims that the Petitioner's first Question proposed to this Court, whether "under general police powers, does a municipal chief of police have the authority during an alleged emergency to create a law such as a curfew and allow exceptions for chicken workers but not for the free exercise of religion", is not supported by the Opinion of the Court of Appeals in this matter because the Court of Appeals

makes no mention of the free exercise of religion in making its finding that the curfew was not selectively enforced.

The Court of Appeals ignored the issue of religious freedom and found that there was no selective enforcement of this alleged curfew, despite uncontroverted testimony that the alleged curfew allowed exceptions for people traveling to work at a chicken processing plant but NOT for the free exercise of religion. It is this failure to grant exceptions for the free exercise of religion while allowing them for non-emergency workers which renders this alleged curfew, regardless of how it was enacted, constitutionally invalid because it violates the Art. 1, Section 1, Paragraph 4 of the Georgia Constitution and the First Amendment of the United States Constitution. The fact that the Court of Appeals attempted to side-step this issue by not referring to it does not make the issue, or the corresponding constitutional right to the free exercise of religion, non existent, particularly in this case when this issue is so clearly supported by the record and this right to the free exercise of religion is so clearly supported by both the United States and the Georgia Constitutions.

WHEREFORE, the Petitioner respectfully requests that this Court reconsider its Order of April 30, 2001 denying

Certiorari in this case and grant a Writ of Certiorari to review the October 13, 2000 Order of the Court of Appeals of the State of Georgia in State v. Forehand, Case No. A00A1597.

This _____ day of April, 2001.

DODD AND DENNIS, P.C.

_____
Sam D. Dennis
Attorney for Appellant
State Bar No. 218315

Post Office Box 1066
Valdosta, GA 31603-1066
(912) 242-4470